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No. 96-1

In the Supreme Court of the United States

OCTOBER TERM, 1995

PAUL G. THOMASSON, PETITIONER

v.

WILLIAM J. PERRY, SECRETARY OF DEFENSE, AND JOHN H. DALTON, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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27 pp

QUESTION PRESENTED

The statutory policy governing service by homosexuals in the military, 10 U.S.C. 654, requires separation of a member who, like petitioner, states that he is a homosexual and fails to rebut the presumption arising from that statement that he has engaged in, or has a propensity to engage in, homosexual acts. The question presented is whether that policy and petitioner's discharge under it are consistent with the First Amendment, equal protection, due process, and the Administrative Procedure Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-85a) is reported at 80 F.3d 915. The opinion of the district court (Pet. App. 86a-110a) is reported at 895 F. Supp. 820.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1996. The petition for a writ of certiorari was filed on July 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The statute governing military service by homosexuals, 10 U.S.C. 654 (Pet. App. 120a-125a), is the result of extensive review of this issue by Congress and the Executive. Pet. App. 8a-12a. On January 29,

1993, the President directed the Secretary of Defense to review the Defense Department's former policy. 29 Weekly Comp. Pres. Doc. 112 (Feb. 1, 1993). Congress simultaneously undertook its own review. Committees of both the Senate and the House of Representatives held extensive hearings, receiving testimony from military commanders, gay-rights activists, military personnel policy experts, and many interested civilians and service members. Pet. App. 9a-10a.

On July 19, 1993, the President announced a new policy on homosexual conduct in the armed forces. 29 Weekly Comp. Pres. Doc. 1369 (July 26, 1993). Congress enacted principal points of that policy in the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1670-1673, codified at 10 U.S.C. 654, which was signed by the President on November 30, 1993.

The statutory policy is grounded in fifteen legislative findings. Congress found, among other things, that "[m]ilitary life is fundamentally different from civilian life" because of "the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion." 10 U.S.C. 654(a)(8)(A). Accordingly, "military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society." 10 U.S.C. 654(a)(8)(B). Those restrictions "regulate a member's life for 24 hours each day," "whether the member is on base or off base, and whether * * * on duty or off duty." 10 U.S.C. 654(a)(9) and (10).

Congress also determined that the longstanding "prohibition against homosexual conduct * * * continues to be necessary in the unique circumstances

of military service." 10 U.S.C. 654(a)(13). "One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members." 10 U.S.C. 654(a)(7). Moreover, service members are deployed in "living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy." 10 U.S.C. 654(a)(12). Based on these findings, Congress concluded (10 U.S.C. 654(a)(15)):

> The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

Accordingly, the statute provides for separation of a service member who is found, "under regulations prescribed by the Secretary of Defense," to have (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; (2) "stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts"; or (3)

"married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. 654(b)(1)-(3).[1]

2. Pursuant to the statutory provisions for the issuance of implementing regulations and procedures, the Department of Defense promulgated several directives to govern separations under the new policy. DoD Directive 1332.30 (Pet. App. 126a-160a), applicable to officers, governs this case, and a substantially similar directive, DoD Directive 1332.14, applies to enlisted personnel. To implement the "statements" provision of the Act (10 U.S.C. 654(b)(2)), DoD Directive 1332.30 provides that a statement by an officer that he "is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." DoD Dir. 1332.30 (Encl 2) ¶ C.1.b; Pet. App. 136a-137a. The statement "I am gay" is expressly identified as such a statement. *Id.* at (Encl 8) ¶ B.4.b; Pet. App. 156a-157a. The officer is "given the opportunity to rebut the presumption by presenting evidence" to an administrative board "demonstrating that he * * * does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts." *Id.* at (Encl 2) ¶ C.1.b; Pet. App. 137a.

A "propensity to engage in homosexual acts" is defined as "more than an abstract preference or desire

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[1] The statute defines "homosexual act" as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." 10 U.S.C. 654(f)(3).

to engage in homosexual acts; it indicates a *likelihood* that a person engages in or will engage in homosexual acts." DoD Dir. 1332.30 (Encl 8) ¶ B.4.d; Pet. App. 157a (emphasis added). By contrast, sexual orientation—defined as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts" (*id.* at ¶ B.5; Pet. App. 157a)—"is considered a personal and private matter, and is not a bar to continued service * * * unless manifested by homosexual conduct." *Id.* at (Encl 2) ¶ C; Pet. App. 135a.[2] An officer's statement that he is a homosexual "is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts." *Ibid.*

The Directive also sets forth the types of evidence an officer may offer to rebut the presumption. DoD Dir. 1332.30 (Encl 2) ¶ C.1.b; Pet. App. 137a.

3. Petitioner was commissioned as an officer in the Navy and rose to the rank of lieutenant. Pet. App. 6a. Soon after reading the Navy message implementing the DoD Directive discussed above, petitioner presented a letter to four admirals for whom he served. *Ibid.* In that letter, he stated, "I am gay." *Ibid.*

The Navy initiated separation proceedings against petitioner based upon that statement. Pet. App. 6a. A Board of Inquiry was convened and held a two-day hearing. Petitioner, who was represented by military

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[2] "Homosexual conduct" is defined by the Directive as "a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." DoD Dir. 1332.30 (Encl 8) ¶ B.4; Pet. App. 156a.

and civilian counsel, presented his service record, testimony and declarations of fellow service members and civilians who had worked with him, declarations of expert witnesses regarding the nature of homosexuality and the military policy, and studies on homosexuals in the military. *Id.* at 6a-7a, 91a. None of the witnesses or declarants who knew petitioner expressed an opinion as to whether he had committed or would commit homosexual acts. *Id.* at 7a. Petitioner did not testify at the hearing, but he read an unsworn statement. *Id.* at 91a. He did not deny that he engaged in or was likely to engage in homosexual acts, but rather stated: "I will not go further in degrading myself by disproving a charge about sexual conduct that no one has made." *Ibid.*

Following the hearing, the Board unanimously found that petitioner had stated that he is a homosexual within the meaning of the policy and that he had not rebutted the presumption raised by those statements. Pet. App. 114a. The Board therefore recommended that he be separated with an honorable discharge. *Id.* at 115a. That recommendation was reviewed and approved by the Deputy Chief of Naval Personnel and an Assistant Secretary of the Navy. *Id.* at 111a-113a.

4. Petitioner then brought this action seeking declaratory and injunctive relief to prevent his discharge. After initially granting petitioner's motion for a preliminary injunction (Pet. App. 92a), the district court granted summary judgment for the government, holding that the challenged statute and directive are valid. *Id.* at 86a-110a. The district court and the court of appeals then denied petitioner a stay pending appeal, and he was honorably discharged. Pet. 10.

5. After a panel of the Fourth Circuit heard oral argument in the case, the full court sua sponte decided to consider petitioner's appeal en banc (Pet. App. 116a-117a), and it affirmed the judgment of the district court. *Id.* at 1a-85a.

a. The court of appeals began by tracing the development of 10 U.S.C. 654, holding that "the product of a serious and prolonged debate" by coordinate branches of government "on a subject of paramount national importance" could not be judicially overturned "in the absence of a clear constitutional mandate." Pet. App. 12a. The court also reviewed the constitutional provisions that "assign[] the conduct of military affairs to the Legislative and Executive branches" (*id.* at 13a) and concluded that "judicial deference * * * is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Id.* at 16a (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981)). The court held that deference was also owed to the professional judgment of military officials. *Id.* at 18a-20a.

The court of appeals then rejected petitioner's equal protection challenge. Pet. App. 21a-28a. It held that the appropriate standard of review was the rational-basis test because the statutory classification of "service members who engage in or have a propensity to engage in homosexual acts" is not suspect, "nor does it burden any fundamental right." *Id.* at 23a. In the court's view, the statute represents "a legitimate legislative choice" based upon Congress's and the military's assessment of the need for unit cohesion, privacy concerns, and the necessity of minimizing sexual tensions and attractions "in the unique circumstances of military service." *Id.* at 24a

(quoting 10 U.S.C. 654(a)(13)), 26a. The court further held that "it is legitimate for Congress to proscribe homosexual acts" and also "to seek to * * * *prevent* the commission of such acts" by means of the "statements" provision of the new policy. *Id.* at 25a. In that regard, the court concluded that the presumption that a service member who states that he is a homosexual has "a propensity or intent to engage in homosexual acts" has "a rational factual basis" and is legally permissible. *Id.* at 27a. The court noted that the rational-basis standard allows for "an imperfect fit between means and ends," "general employment policies to prevent unsatisfactory conduct," and "a reasonable means of allocating the burden of proof." *Id.* at 27a-28a (quoting *Heller* v. *Doe*, 509 U.S. 312, 321 (1993)).

The court of appeals also rejected the contention that the "statements" portion of the new statute violates the First Amendment. Pet. App. 29a-35a. The court held that "[t]he statute does not target speech declaring homosexuality; rather" it permissibly "uses the speech as evidence" of "homosexual acts and the propensity or intent to engage in homosexual acts." *Id.* at 29a. The court also noted that the First Amendment rights of military personnel are more limited than those of civilians and that the government as employer may restrict certain speech of even its non-military employees to promote the effective performance of its functions. *Id.* at 34a.

Finally, the court held that the new policy does not violate due process or the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Pet. App. 35a-36a. The court reiterated its conclusion that the rebuttable presumption is "entirely rational," and determined that petitioner had "received a full and adequate hearing in which substantial evidence established that he

stated that he was a homosexual and that he failed to rebut the presumption triggered thereby." *Id.* at 35a.

b. Two members of the majority wrote concurring opinions. Judge Murnaghan stated that the case could be decided simply on the grounds that the presumption in the new policy "is rational and thus constitutional," and that petitioner did not rebut that presumption. Pet. App. 36a.

Judge Luttig, joined by five other judges, also concurred. Pet. App. 36a-71a. He construed 10 U.S.C. 654 to be status-based, not conduct-based, and hence to forbid all "known homosexuals from serving in the military." Pet. App. 37a. Under that construction, petitioner's discharge would be required without regard to his past or likely future acts. Judge Luttig would have held that the new policy, as so construed, is constitutional. *Id.* at 48a, 60a-71a.[3]

c. Judge Hall, joined by three other judges, dissented. Pet. App. 71a-85a. The dissenters would have held that the new policy violates equal protection because, in their view, it "was motivated by a desire to accommodate prejudice against homosexuals" and it presumes "misconduct from a person's status." *Id.* at 77a, 82a. They also would have held the policy invalid

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[3] In Judge Luttig's view, the DoD Directive implementing the statute is invalid because it excludes only homosexuals who have engaged in homosexual acts or who are likely to do so. Pet. App. 54a-59a. The term "homosexual" is defined by 10 U.S.C. 654(f)(1) as "a person * * * who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts," and the Directive defines "propensity" as "likelihood." DoD Dir. 1332.30 (Encl 1) ¶ 13; Pet. App. 132a. Judge Luttig believed that "propensity" should be construed to mean "inclination," not "likelihood." Pet. App. 48a-49a.

under the First Amendment on the grounds that it impermissibly classifies among homosexuals based upon their speech and that the Navy did not present evidence that petitioner had violated any rule of conduct or was likely to do so. *Id.* at 83a, 84a.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court, and is in accord with the decision of the only other court of appeals to have decided the constitutionality of the policy regarding military service by homosexuals set forth in 10 U.S.C. 654. Although the constitutional issue is important, certiorari is not warranted. There is no conflict among the circuits, and the issue is currently pending in other courts of appeals.

1. a. The legislative classification in 10 U.S.C. 654(b)(2)—barring service by members who state that they are homosexuals and who fail to demonstrate that they have not engaged in homosexual acts and do not have an intent or propensity to do so—does not violate equal protection. As the court below held (Pet. App. 23a), this conduct-based classification in the military context is not suspect and does not burden any fundamental right, and is therefore reviewable under the rational-basis test. All five courts of appeals that reviewed equal protection challenges to the military's former policy, which contained essentially the same classification, agreed that the rational-basis test is the appropriate standard of review.[4] In addition, the court below followed this

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[4] *Steffan* v. *Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Meinhold* v. *United States Dep't of Defense*, 34 F.3d 1469, 1478 (9th Cir. 1994); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990);

Court's precedents (*id.* at 13a-21a) in according great deference both to the constitutional authority of Congress and the Executive over military affairs and to the considered professional judgment of military officials on personnel policies. *E.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 64-72 (1981); *Goldman* v. *Weinberger*, 475 U.S. 503, 509 (1986).

Woodward v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Dronenburg* v. *Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984); *Rich* v. *Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984). See also *High Tech Gays* v. *DISCO*, 895 F.2d 563, 570-574 (9th Cir. 1990).

Although the new policy differs from the former policy in certain respects, the standards for discharge are substantially similar. See *Able* v. *United States*, 88 F.3d 1280, 1286-1287 (2d Cir. 1996). The former regulatory policy also mandated separation for a homosexual act, a homosexual marriage, or for a statement by a member "that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual." DoD Dir. 1332.14 ¶ H.1.c.(2) (1982) (superseded), *reprinted in* 32 C.F.R. Ch. 1, Pt. 41, App. A (1995). Under the former policy, "homosexual" was defined as "a person, regardless of sex, who engages in, *desires to engage in*, or intends to engage in homosexual acts." *Id.* at ¶ H.1.b.(1) (emphasis added) (Pet. App. 59a n.10). The new statute's substitution of "propensity" for "desires" was regarded as "a useful clarification," not a change. S. Rep. No. 112, 103d Cong., 1st Sess. 290 (1993). The General Counsel of the Defense Department testified that "propensity" would be interpreted in accord with the Department's interpretation of the former policy. *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services*, 103d Cong., 2d Sess. 774 (1993). The leading cases upholding the former policy support the conclusion that "propensity" is best understood to mean "likelihood." See *Ben-Shalom* v. *Marsh*, 881 F.2d at 459, 464; *Steffan* v. *Perry*, 41 F.3d at 689, 691, 695.

b. The challenged statute must be sustained under the foregoing principles. Every appellate court to have considered the issue has recognized that the government has a legitimate interest in prohibiting homosexual acts in the military.[5] To avoid the risk to military effectiveness posed by such acts, Congress enacted a classification that reasonably presumes—subject to rebuttal by the service member—that a member who states that he is a homosexual is likely to act consistently with his sexuality and engage in prohibited homosexual acts. As the court below demonstrated (Pet. App. 24a-26a), it was clearly reasonable for Congress to conclude that discharging a member who has a propensity to commit such acts advances the goal of military readiness by preventing the occurrence of those acts, promoting unit cohesion, accommodating members' privacy interests, and avoiding sexual tensions.

Moreover, three established legal doctrines directly support the validity of the rebuttable presumption. First, the presumption merely allocates the burden of proof to a service member who has identified himself as a homosexual to show that he does not, and is not likely to, engage in homosexual acts. "Outside

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[5] *Steffan* v. *Perry*, 41 F.3d at 685; *Meinhold* v. *United States Dep't of Defense*, 34 F.3d at 1477; *Ben-Shalom* v. *Marsh*, 881 F.2d at 461; *Woodward* v. *United States*, 871 F.2d at 1076; *Dronenburg* v. *Zech*, 741 F.2d at 1398; *Rich* v. *Secretary of the Army*, 735 F.2d at 1228; *Beller* v. *Middendorf*, 632 F.2d 788, 812 (9th Cir. 1980), cert. denied, 452 U.S. 905 & 454 U.S. 855 (1981). See also *Walmer* v. *United States Dep't of Defense*, 52 F.3d 851 (10th Cir.), cert. denied, 116 S. Ct. 474 (1995); *Falk* v. *Secretary of the Army*, 870 F.2d 941, 947 (2d Cir. 1989); *Hatheway* v. *Secretary of the Army*, 641 F.2d 1376, 1382 (9th Cir.), cert. denied, 454 U.S. 864 (1981).

the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976). Second, the government may validly adopt general employment policies to avoid the risks of prohibited conduct. *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 591-592 (1979). Third, in any event, a classification is not rendered invalid under rational-basis review simply because there may be "an imperfect fit between means and ends." *Heller* v. *Doe*, 509 U.S. 312, 321 (1993). That principle is illustrated by this Court's decisions upholding mandatory retirement ages as applied to persons who were fully able to perform their jobs beyond the specified retirement ages. *Vance* v. *Bradley*, 440 U.S. 93, 108 (1979); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 311, 316 (1976) (per curiam).[6]

c. Because the statute rationaly advances the legitimate goals discussed above, petitioner's claim (Pet. 17-20) that it is unconstitutionally grounded in prejudice is without merit. Under the rational-basis standard, only a statute that lacks any rational basis can be said to be the kind of "invidious discrimination" or "wholly arbitrary act" that equal protection condemns. *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303-304 (1976) (per curiam). For example, in *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Court overturned municipal zoning requirements that were imposed on group homes for

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[6] Qualification standards for military service have long been set forth in general categories, such as minimum and maximum age limits, physical requirements, and the exclusion of specified classes such as ex-felons. See, *e.g.*, 10 U.S.C. 504, 505.

mentally retarded persons but not on any other group home or multiple-dwelling building. This Court explained that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from" other group homes. *Id.* at 448. Only after reviewing each of the proffered rationales and finding none that justified the difference in treatment did the Court conclude that the permit requirement in issue rested upon "an irrational prejudice against the mentally retarded." *Id.* at 450.

In contrast, the policy challenged here was adopted after Congress and the Executive Branch fully considered both sides of the debate over the controversial issue of military service by homosexuals, including in particular the criticism that the policy was based on prejudice. The Senate Armed Services Committee emphasized that "its position on the service of gays and lesbians is not based upon stereotypes." S. Rep. No. 112, 103d Cong., 1st Sess. 282 (1993).[7] Rather, the statute embodies Congress's judgment about "the impact in the military setting of the conduct that is

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[7] For example, Congress rejected the "stereotypical" notion that homosexuals are sexual "predators" who "find every person of the same sex to be sexually attractive." S. Rep. No. 112, *supra*, at 284. Moreover, the policy applies only to military personnel. Homosexuals are not excluded from working as civilian employees of the Department of Defense or its contractors, and, indeed, service members are required to work side-by-side with any homosexual civilian employee in the office setting. See *id.* at 279, 281. The policy is therefore narrowly tailored to meet the unique demands of military service, such as the need for unit cohesion and the protection of privacy interests among service members.

an integral element of homosexuality" (*ibid.*) and the considered professional judgment of military authorties after a "careful, thorough, and open-minded review" as to what is best for military effectiveness (*id.* at 279). As General Colin Powell explained (*id.* at 281):

> [O]pen homosexuality in units is not just the acceptance of benign characteristics such as color or gender or background. It involves matters of privacy and human sexuality that, in our judgment, if allowed to exist openly in the military, would affect the cohesion and well-being of the force. It asks us to deal with fundamental issues that the society at large has not yet been able to deal with.

General Powell also testified that "it would be prejudicial to good order and discipline" if the military required heterosexuals and homosexuals "to share the most private facilities together, the bedroom, the barracks, latrines, and showers." *Id.* at 283.

These same concerns underlie military policies that seek, where possible, to provide men and women with separate living arrangements to "accommodate sexual privacy" and avoid "increased sexual tension" that would "disrupt unit cohesion." S. Rep. No. 112, *supra*, at 277-278. The Senate Committee recognized that, just as "[i]t is reasonable for the armed forces to take these factors into consideration in establishing gender-based assignment policies," it also "is reasonable for the armed forces to take [them] into consideration when addressing issues concerning persons who engage in or have the propensity or intent to engage in sexual activity with persons of the same sex." *Id.* at 278.

In short, as Congress specifically concluded, the statute does not embody "an irrational prejudice against gays and lesbians." S. Rep. No. 112, *supra*, at 283. See *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 465 (7th Cir. 1989) ("the concerns set forth in the [former] military policy and regulation can[not] be so easily dismissed as mere prejudice"), cert. denied, 494 U.S. 1004 (1990); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Dronenburg* v. *Zech*, 741 F.2d 1388, 1397-1398 (D.C. Cir. 1984).

d. This Court's recent decision in *Romer* v. *Evans*, 116 S. Ct. 1620 (1996), does not cast doubt on the validity of 10 U.S.C. 654. *Romer* addressed Amendment 2 to Colorado's constitution, which the Court described as a "[s]weeping" and "unprecedented" measure that withdrew from homosexuals the "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society," so much so as to "deem a class of persons a stranger to its laws." 116 S. Ct. at 1625, 1627, 1628, 1629. Applying the rational-basis test, the Court held that Amendment 2 violated the equal protection guarantee of the Fourteenth Amendment because that "exceptional" and "invalid form of legislation" "is not within our constitutional tradition." *Id.* at 1627, 1628. The Court also explained that "[t]he breadth of the Amendment is so far removed from the[] particular justifications" offered for it that the Court was unable to find "any identifiable legitimate purpose or discrete objective" served by the "status-based enactment." *Id.* at 1629. Accordingly, the Court was left with "the inevitable inference that the disadvantage

imposed is born of animosity toward the class of persons affected." *Id.* at 1628.

The statute at issue here is markedly different. First, of course, *Romer* arose in the civilian context. This case, by contrast, arises in the military, which "constitutes a specialized community governed by a separate discipline from that of the civilian." *Loving* v. *United States*, 116 S. Ct. 1737, 1751 (1996) (quoting *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953)). *Romer* therefore does not affect precedents, such as *Parker* v. *Levy*, 417 U.S. 733, 756 (1974), holding that "Congress is permitted to legislate both with greater breadth and with greater flexibility" in the military context. See *Rostker* v. *Goldberg*, 453 U.S. 57 (1981) (sustaining men-only draft law).

Second, the scope of 10 U.S.C. 654 is much narrower than Amendment 2 in *Romer*, which applied pervasively in all aspects of society. Section 654 addresses one qualification for military service, and it was enacted following a thorough examination by both the Executive and Legislative Branches of the particular problems caused by service members who engage in homosexual acts or whose actions or statements indicate a propensity to engage in such acts. Compare *Romer*, 116 S. Ct. at 1627 (distinguishing Amendment 2 from laws sustained against equal protection challenges in other cases, which "were narrow enough in scope and grounded in a sufficient factual context for [the Court] to ascertain that there existed some relation between the classification and the purpose it served").

Third, as discussed above (see pages 2-5, 12-14, *supra*), Section 654, unlike Amendment 2, classifies not on the basis of status, but rather on the basis of homosexual acts and the propensity to commit such

acts. Thus, the statute is more limited than Amendment 2 not only in the scope of its prohibition, but also as to the persons it affects—*i.e.*, military personnel whose affirmative behavior or statements trigger an inquiry as to whether they have engaged, or likely will engage, in prohibited homosexual acts.

Most importantly, 10 U.S.C. 654 is a rational means of serving the legitimate objectives of prohibiting homosexual acts in the military, promoting unit cohesion, protecting privacy interests, and reducing sexual tensions. See pages 12-16, *supra*. Congress determined that those objectives go to the "essence of military capability" and that retaining the long-standing prohibition against homosexual conduct in the military is necessary to achieve them. 10 U.S.C. 654(a)(13) and (14). For those reasons, the statute, unlike Amendment 2, does not impermissibly rest upon "a bare . . . desire to harm a politically unpopular group." *Romer* v. *Evans*, 116 S. Ct. at 1628 (quoting *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973)).

2. Petitioner's claim (Pet. 20-23) that 10 U.S.C. 654(b)(2) violates the First Amendment also lacks merit. The Second Circuit recently joined the court below in rejecting a First Amendment challenge to the new policy, although that court conditioned its holding upon a determination that the policy's underlying prohibition of homosexual acts is valid, and it remanded for resolution of that issue. *Able* v. *United States*, 88 F.3d 1280 (2d Cir. 1996).[8]

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[8] As noted above (see pages 10-11 n.4, *supra*), five courts of appeals have sustained the prohibition of homosexual acts by military personnel. Similar challenges to the analogous "statements" provision in the former policy were rejected by all

The new policy treats a service member's statement of homosexuality as a basis from which to presume, in the absence of rebuttal, that the service member engages in, or is likely to engage in, homosexual acts. The First Amendment does not prohibit such evidentiary use of a service member's statement. See *Wayte* v. *United States*, 470 U.S. 598 (1985). In addition, expressive conduct may be restricted in the military context if it is "likely to interfere with * * * vital prerequisites for military effectiveness." *Brown* v. *Glines*, 444 U.S. 348, 354 (1980). The express legislative findings supporting the new policy and the ample congressional testimony upon which those findings are based show that this test is met with respect to the evidentiary use of petitioner's statement here.

3. The court of appeals also correctly rejected (Pet. App. 35a-36a) petitioner's claims (Pet. 23-25) under the Due Process Clause and the APA. Petitioner was afforded a full and fair opportunity at his administrative hearing to rebut the presumption that he has engaged in or likely will engage in homosexual acts, and the Board's finding that he did not rebut the presumption is amply supported, as both courts below concluded. Pet. App. 35a, 91a. That fact-bound determination by both courts below does not warrant review by this Court. Cf. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

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three courts of appeals to have considered the issue. *Pruitt* v. *Cheney*, 963 F.2d 1160, 1163-1164 (9th Cir. 1991), cert. denied, 506 U.S. 1020 (1992); *Schowengerdt* v. *United States*, 944 F.2d 483, 489 (9th Cir. 1991), cert. denied, 503 U.S. 951 (1992); *Ben-Shalom* v. *Marsh*, 881 F.2d at 458-462; *Rich* v. *Secretary of the Army*, 735 F.2d at 1228-1229. See also *High Tech Gays* v. *DISCO*, 895 F.2d at 578-580.

4. The en banc Fourth Circuit in this case and the Second Circuit in *Able* correctly decided the important issues discussed above, and their thorough and persuasive opinions should resolve any uncertainty as to the validity of the challenged policy.[9] The validity of the policy is also at issue in cases now pending before two other courts of appeals. *Richenberg* v. *Perry*, 909 F. Supp. 1303 (D. Neb.), injunction pending appeal denied, 73 F.3d 172 (1995), appeal pending, No. 95-4181 (8th Cir. argued Apr. 8, 1996); *Philips* v. *Perry*, 883 F. Supp. 539 (W.D. Wash. 1995), appeal pending, No. 95-35293 (9th Cir. argued Mar. 4, 1996); *Watson* v. *Perry*, 918 F. Supp. 1403 (W.D. Wash. 1996), appeal pending, No. 96-35314 (9th Cir. argued July 8, 1996); *Holmes* v. *California Army Nat'l Guard*, 920 F. Supp. 1510 (N.D. Cal. 1996), appeals pending, Nos. 96-15726 & 96-15855 (9th Cir. argued July 8, 1996). If a

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[9] Judge Luttig's concurring opinion in this case erroneously construed the statutory policy as excluding homosexuals on the basis of their status, not conduct, and on that basis concluded that the conduct-directed standards of DoD Directive 1332.30 are invalid. Pet. App. 36a-71a. That position was persuasively rejected in *Able* v. *United States*, 88 F.3d at 1298-1299. The statute uses but does not define the term "propensity." 10 U.S.C. 654(f)(1). The statute provides for the Secretary to issue regulations and procedures to implement its provisions, specifically including the provision addressing statements by a member that he or she is a homosexual. See 10 U.S.C. 654(b) and (b)(2). The Secretary's interpretation and implementation of the statute in this setting therefore is entitled to substantial deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). As the Second Circuit held, the Directive reasonably defines "propensity" to engage in homosexual acts as a "likelihood" to engage in such acts. The legislative history supports the regulatory definition. See page 11 n.4, *supra*.

circuit conflict should develop as a result of a decision in one of those cases, then this Court's review may well be warranted. If, however, those two courts of appeals agree with the Second and Fourth Circuits, then the validity of 10 U.S.C. 654 would seem beyond challenge, particularly since four additional circuits —the District of Columbia, Federal, Seventh, and Tenth Circuits (see pages 10-11 n.4, *supra*)—rejected constitutional challenges to the substantially similar discharge standards of the former policy.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] The Ninth Circuit in *Meinhold* v. *United States Department of Defense*, *supra*, sustained the former policy only after construing it in a unique, narrow, and in our view erroneous manner. The en banc D.C. Circuit in *Steffan* v. *Perry*, *supra*, criticized *Meinhold*, and its rejection of the *Meinhold* construction is persuasive. *Steffan* v. *Perry*, 41 F.3d at 687 n.7, 694 & n.18.